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Comprehensive Guidelines for the Commercial Activities Exception of the Foreign Sovereign Immunities Act: Texas Trading & (and) Milling Corp. v. Federal Republic of Nigeria

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Comprehensive Guidelines For The Commercial Activities Exception Of The Foreign Sovereign Immunities Act: *Texas Trading & Milling Corp. v. Federal Republic of Nigeria*

In *Texas Trading & Milling Corp. v. Federal Republic of Nigeria*,[1] the court establishes the first comprehensive test for finding jurisdiction over a foreign state under the commercial activity exception of the Foreign Sovereign Immunities Act (Immunities Act).[2] Congress intended that the Immunities Act provide a "comprehensive jurisdictional scheme in cases involving foreign states" and that a "uniformity of decision" would result.[3] Uniformity is desirable because disparate treatment of foreign states might have adverse foreign policy consequences. Decisions construing the Immunities Act have so far been quite varied. In particular, interpretations of the key commercial activity exception to sovereign immunity[4] have resulted in diverse opinions. Consequently, the *Texas Trading* decision is a welcome step toward a uniform construction of the Immunities Act.

I. FACTS OF THE CASE

Seven appeals involving the Immunities Act were decided on the same day by the Second Circuit Court of Appeals. Four of the appeals, including *Texas Trading*, were consolidated for decision since they involved similar facts.[5]

As part of a massive building program, Nigeria contracted in 1975 to buy cement from suppliers all over the world. Four of the 109 contracts executed at that time were made with the plaintiffs, all New York corporations. Each contract called for the supplier to sell Nigeria 240,000 metric tons of Portland cement and required Nigeria to establish in seller's favor an irrevocable and confirmed letter of credit for the total amount due. Instead of establishing confirmed letters of credit at the banks specified in the contracts, Nigeria set up irrevocable letters of credit with the

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1. 647 F.2d 300 (2d Cir. 1981).

2. The Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§ 1330, 1332(a)(2)-(4), 1391(f), 1441(d), 1602-1611 (1976).

3. H.R. REP. NO. 1487, 94th Cong., 2d Sess. 13, *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS 6604, 6611 [hereinafter cited as HOUSE REPORT].

4. 28 U.S.C. § 1605(a)(2) (1976).

5. The three other plaintiffs in the consolidated appeal with *Texas Trading* were: Decor by Nikkei Int'l, Inc.; Chenax Majesty, Inc.; and East Europe Import-Export. The three other appeals also decided on the same day were Verlinden B.V. v. Central Bank of Nigeria, 647 F.2d 320 (2d Cir. 1981); Reale Int'l, Inc. v. Federal Republic of Nigeria, 647 F.2d 330 (2d Cir. 1981); and Gemini Shipping, Inc. v. Foreign Trade Org. for Chem. & Foodstuffs, 647 F.2d 317 (2d Cir. 1981).

Central Bank of Nigeria[6] and advised those letters of credit through Morgan Guaranty Trust Company of New York. Nigeria chose Morgan because of a longstanding relationship between Nigeria and Morgan.[7]

In the summer of 1975, Nigeria began to realize it had ordered too much cement as its port facilities could not unload the ships fast enough.[8] With demurrage accruing rapidly, Nigeria cabled its suppliers and asked them to stop sending cement. As a result, in September, Central Bank instructed Morgan not to pay under the letters of credit unless the supplier submitted a statement from Central Bank that payment ought to be made.

The four suppliers sued Nigeria and Central Bank alleging anticipatory breaches of the cement contracts and of the letters of credit. Nigeria and Central Bank did not dispute these claims. Instead, they claimed immunity from the jurisdiction of American courts under the Immunities Act. At the district court level, jurisdiction was found lacking in *Texas Trading*.[9] However, it was found present in *Decor by Nikkei Int'l, Inc. v. Federal Republic of Nigeria*, *East Europe Import-Export v. Federal Republic of Nigeria*, and *Chenax Majesty, Inc. v. Federal Republic of Nigeria*.[10] The court of appeals found jurisdiction proper in all four cases.[11]

II. THE FOREIGN SOVEREIGN IMMUNITIES ACT OF 1976

Sovereign immunity is the principle of international law that grants a sovereign state immunity from the jurisdiction of the courts of other nations.[12] The doctrine first appeared in American jurisprudence in *The Schooner Exchange v. M'Faddon*.[13] Under the absolute theory of sovereign immunity, both the public and private acts of a sovereign nation are exempt from the jurisdiction of another nation's courts.[14] Under the restrictive theory of sovereign immunity, suits against a foreign government are permitted when that state is involved in commercial or business ven-

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6. Central Bank is an instrumentality of the Nigerian government.

7. Central Bank used Morgan as its correspondent bank in the United States, and Morgan conducted myriad transactions on Nigeria's behalf. Central Bank sent its employees to Morgan for training and made it a regular practice to advise letters of credit through Morgan.

8. By July 1975, 260 ships full of cement were waiting in the harbor at Lagos/Apapa to unload.

9. Texas Trading & Milling Corp. v. Federal Republic of Nigeria, 500 F. Supp. 320 (S.D.N.Y. 1980).

10. These three cases were consolidated for trial at the district court level. Decor by Nikkei Int'l, Inc. v. Federal Republic of Nigeria, 497 F. Supp. 893 (S.D.N.Y. 1980).

11. Thus, the district court decisions in *Decor*, *East Europe*, and *Chenax* were affirmed and *Texas Trading* was remanded for a trial on the merits.

12. T. GUITTARI, THE AMERICAN LAW OF SOVEREIGN IMMUNITY 9 (1970).

13. 11 U.S. (7 Cranch) 116 (1812).

14. T. GIUTTARI, *supra* note 12, at 9. *The Schooner Exchange* exempted only public property from jurisdiction, but American courts subsequently extended immunity to a sovereign's private property as well thereby making absolute sovereign immunity the standard in American courts. Berizzi Bros. Co. v. Steamship Pesaro, 271 U.S. 562 (1926).

tures.[15] The Immunities Act was enacted by Congress in order to codify the restrictive theory of sovereign immunity.[16] This act incorporates the restrictive theory by making a general grant of immunity to foreign states[17] and then listing exceptions to that immunity.[18] The "commercial activity" exception with which *Texas Trading* is concerned provides that:

> A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case . . . in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States . . . .[19]

Once a foreign state's activity is found to fall under any of the exceptions, including the commercial activity exception, the federal courts have jurisdiction over the foreign state under 28 U.S.C. § 1330.[20] Section 1330(b)

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15. T. GUITTARI, *supra* note 12, at 9. In *The Navemar*, American courts began a new policy of deference to State Department decisions as to whether sovereign immunity existed. Compania Española de Navegacion Maritima, S.A. v. The Navemar, 303 U.S. 68 (1938). The trend begun in *The Navemar* became firmly accepted. *See* Republic of Mexico v. Hoffman, 324 U.S. 30, 35 (1945).

This development was important as the Department of State, in 1952, embraced the restrictive view of sovereign immunity through the issuance of the Tate Letter. Letter from Jack B. Tate, Acting Legal Adviser of the Department of State, to Phillip B. Perlman, Acting Attorney General (May 19, 1952), *reprinted in* 26 DEP'T ST. BULL. 984 (1952); *also reprinted in* Alfred Dunhill, Inc. v. Republic of Cuba, 415 U.S. 682, 711 app. 2 (1976). In deference to the executive branch, the judiciary branch followed the Department of State's lead. As a result, by the 1970's, the restrictive theory became the prevailing standard accepted by American courts. T. GIUTTARI, *supra* note 12, at 224.

However, application of the restrictive standard by the courts and by the Department of State was not uniform. Furthermore, the Department of State began to realize it could implement foreign policy with less irritation if sovereign immunity questions were decided by the courts. *See* Timberg, *Sovereign Immunity and Act of State Defenses: Transnational Boycotts and Economic Coercion*, 55 TEX. L. REV. 1, 11-12 (1976). Since the courts were still bound by the *Navemar* line of cases, congressional action was necessary to give the courts back the power to decide sovereign immunity questions. As a result, the Foreign Sovereign Immunities Act was adopted by Congress in 1976.

16. The House Report states that the Immunities Act has four main objectives: (1) To codify the restrictive principle of sovereign immunity as presently recognized in international law; (2) to transfer the determination of sovereign immunity from the executive branch to the judicial branch, thereby reducing foreign policy implications and assuring litigants of a legal forum under procedures that insure due process; (3) to provide a statutory procedure for making service upon, and obtaining in personam jurisdiction over, foreign states; and (4) to provide the judgment creditor with a remedy to satisfy final judgment. HOUSE REPORT, *supra* note 3, at 6605-06.

17. 28 U.S.C. § 1604 (1976).

18. *Id.* §§ 1605-1607 (1976).

19. *Id.* § 1605(a)(2) (1976).

20. Section 1330 provides:

> (a) The district courts shall have original jurisdiction without regard to amount in controversy of any nonjury civil action against a foreign state as

was intended as a long-arm statute,[21] and the requirement of minimum jurisdictional contacts is embodied in 1330(b).[22]

III. THE *Texas Trading* FIVE-PART TEST

The *Texas Trading* court established a five-part test for finding personal jurisdiction under the commercial activity exception of the Immunities Act:

> 1) Does the conduct the action is based upon or related to qualify as 'commercial activity'?
> 2) Does that commercial activity bear the relation to the cause of action and to the United States described by one of the three phrases of § 1605(a)(2), warranting the Court's exercise of subject matter jurisdiction under § 1330(a)?
> 3) Does the exercise of this congresssional subject matter jurisdiction lie within the permissible limits of the 'judicial power' set forth in Article III?
> 4) Do subject matter jurisdiction under § 1330(a) and service under § 1608 exist, thereby making personal jurisdiction proper under § 1330(b)?
> 5) Does the exercise of personal jurisdiction under § 1330(b) comply with the due process clause, thus making personal jurisdiction proper?[23]

This five-part test is unique. It is the first comprehensive test to determine jurisdiction under the commercial activity exception promulgated by any court. It is also unique in separating out subject matter, personal jurisdiction,[24] constitutional, and statutory questions.[25]

> defined in section 1603(a) of this title as to any claim for relief in personam with respect to which the foreign state is not entitled to immunity either under sections 1605-1607 of this title or under any applicable international agreement.
> (b) Personal jurisdiction over a foreign state shall exist as to every claim for relief over which the district courts have jurisdiction under subsection (a) where service has been made under section 1608 of this title.

28 U.S.C. § 1330 (1976).

21. HOUSE REPORT, *supra* note 3, at 6611.

22. The minimum contacts standard intended by Congress is that of International Shoe v. Washington, 326 U.S. 310 (1945) and McGee v. International Life Insurance Co., 355 U.S. 220 (1957). In addition, sections 1605-1607 themselves are intended to prescribe the necessary contacts which must exist before U.S. courts can exercise jurisdiction over a foreign state. HOUSE REPORT, *supra* note 3, at 6611-12.

23. 647 F.2d at 308.

24. Two other courts before the *Texas Trading* decision indicated that the section 1605(a)(2) subject matter question and the section 1330(b) minimum contacts questions required separate determinations. The district court opinion in *Decor*, which *Texas Trading* affirms, separately determined the section 1605(a)(2) direct effects question and the section 1330(b) minimum contacts question. 497 F. Supp. at 893. In addition, the *Waukesha* court indicated that there should be two separate determinations. However, the minimum contacts question was the only part of the analysis pursued. Waukesha Engine Div., Dresser Americas, Inc. v. Banco Nacional de Fomento Cooperativo, 485 F. Supp. 490 (E.D. Wis. 1980).

In the course of their decisionmaking, most courts focus on the one element of the Immunities Act that determines the case before them. Yet, implicit in most analyses is a two-step test which involves an initial determination of whether the activity is commercial and a subsequent determination of whether personal jurisdiction exists. In making the second determination, most courts consider that if there are sufficient contacts to satisfy the commercial activity exceptions of section 1605(a)(2), the constitutional minimum contacts standards are also met.[26] These courts are reading sections 1330(b) and 1605(a)(2) together. The House Report notes that section 1605(a)(2) prescribes the necessary contacts which must exist before American courts can exercise jurisdiction over a foreign state and that section 1330(b) incorporates these standards by reference.[27] In addition, the House Report indicates that section 1330(b) embodies the constitutional minimum contacts standards.[28] Therefore, satisfaction of section 1605(a)(2) does not necessarily mean that the due process clause requirements have been met.

In making the second determination, other courts have held that if the constitutional minimum contacts standards are met, the section 1605(a)(2) standards are satisfied.[29] These courts do not require a connection between at least some of the contacts and the cause of action. However, the legislative history indicates that there should be a nexus between the contacts of the foreign state with the United States and the cause of action.[30] The better reading of the Immunities Act and its legislative history is that the requirement of sections 1605(a)(2) and 1330(b) must be satisfied in separate analyses. This is the approach adopted by *Texas Trading*.

A. *Commercial Activity*

The Immunities Act defines "commercial activity" as: "[E]ither a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose."[31]

The determination of whether the foreign state's activity is commercial is critical since the foreign state will be immune from jurisdiction if

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25. One other court has made the distinction that subject matter jurisdiction under article III of the Constitution must also exist before jurisdiction under the Immunities Act can be found. Verlinden v. Central Bank of Nigeria, 488 F. Supp. 1284 (S.D.N.Y. 1980), *aff'd*, 647 F.2d 320 (2d Cir. 1981).

26. *See* East Europe Domestic Int'l Sales v. Terra, 467 F.2d 806 (2d Cir. 1979); Chicago Bridge & Iron Co. v. Islamic Republic of Iran, 506 F. Supp. 981 (N.D. Ill. 1980); and Harris v. VAO Intourist, Moscow, 481 F. Supp. 1056 (E.D.N.Y. 1979).

27. HOUSE REPORT, *supra* note 3, at 6611-12.

28. *See* note 22 *supra*.

29. Sugarman v. Aeromexico, Inc., 626 F.2d 270 (3d Cir. 1980).

30. HOUSE REPORT, *supra* note 3, at 6617.

31. 28 U.S.C. § 1603(d) (1976).

the activity is sovereign. In order to reach this threshold determination, the *Texas Trading* court looked to three sources as guides for ascertaining the meaning of commercial activity: the legislative history of the Immunities Act,[32] American case law prior to the passage of the Act,[33] and the current standards of international law.[34] Under each of these three, Nigeria's cement contracts and letters of credit were found to qualify as commercial activity.

The legislative history indicates that the courts should be given a great deal of latitude in determining what is a commercial activity and illustrates, as examples of such activity, contracts for the sale of goods and the borrowing of money. The House Report also emphasized that it is the nature of the act, not the foreign state's purpose in engaging in the activity that is determinative.[35] The *Texas Trading* court seemed to embrace these concepts.

The fact that the holding in *Texas Trading* relies on American case law prior to the passage of the Immunities Act is unusual. In fact, *United Euram v. U.S.S.R.*[36] held that *Victory Transport*[37] was superceded by the Immunities Act. *United Euram* seems to be a better reasoned opinion than *Texas Trading*, as the *Euram* court noted that the Immunities Act focuses on the nature of the activity, not the purpose.[38] Although the *Texas Trading* court's reasoning seems a bit obscure, the cases cited by the court as precedent are cited for the proposition that contracting for the shipment of goods is commercial activity when engaged in by sover-

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32. The court also relies on the *Hearings on H.R. 11315 Before the Subcomm. on Administrative Law and Governmental Relations of the House Comm. on the Judiciary*, 94th Cong., 2d Sess. 53 (1976) [hereinafter cited as *1976 Hearings*] and the *Hearings on H.R. 3493 Before the Subcomm. on Claims and Governmental Relations of the House Comm. on the Judiciary*, 93rd Cong., 1st Sess. 16 (1973). These were hearings held on the first version of the Immunities Act which was not passed by Congress.

33. The court cites Isbrandtsen Tankers, Inc. v. President of India, 446 F.2d 1198 (2d Cir. 1966), *cert. denied*, 385 U.S. 931 (1966), and Victory Transport, Inc. v. Comisaria General de Abastecimientos y Transportes, 336 F.2d 354 (2d Cir. 1964), *cert. denied*, 381 U.S. 934 (1965).

34. The international sources relied on by the court are: The State Immunity Act 1978, § 3 (U.K.), *reprinted in* 48 HALSBURY'S STATUTES OF ENGLAND 85 (3d ed. 1979) [hereinafter cited as 48 HALSBURY'S STATUTES]. Council of Europe, European Convention on State Immunity, art. 4 (1972), *reprinted in 1976 Hearings*, *supra* note 32, at 37-38; Claim Against The Empire of Iran, 45 I.L.R. 57 (W. Ger. BVerfG 1963); and Trendtex Trading Corp. v. Central Bank of Nigeria, [1977] Q.B. 529.

35. HOUSE REPORT, *supra* note 3, at 6614-15.

36. 461 F. Supp. 609 (S.D.N.Y. 1978).

37. Victory Transport, Inc. v. Comisaria General de Abastecimientos y Transportes, 336 F.2d 354 (2d Cir. 1964), *cert. denied*, 381 U.S. 934 (1965). According to *Victory Transport*, if the foreign state's act fell into one of five categories, the state was immune from jurisdiction. The five categories were: internal administrative acts, acts concerning the armed forces, legislative acts, acts concerning diplomatic activity and public loans. 336 F.2d at 360.

38. Thus, according to *Victory Transport*, buying goods for a foreign state's army would be a sovereign act. However, under the Immunities Act, it would be a commercial act. *See* HOUSE REPORT, *supra* note 3, at 6614-15.

eign states.[39]

Of more significance, however, is *Texas Trading's* reliance on international sources to give content to the term "commercial activity." The sources relied on accept the "nature" test for commercial activity[40] and indicate that contracts for the supply of goods and financial arrangements are commercial activities.[41] In general, the test for commercial activity to be deduced from these sources is whether the foreign state has exercised its sovereign authority or acted as a private person.[42]

The use of international sources is a desirable step since sovereign immunity decisions often have political ramifications. Thus, one court has indicated that "commercial activity" should be defined narrowly so as to "keep the courts away from those areas that touch very closely upon the sensitive nerves of foreign countries."[43] Another court has noted that "commercial activity" need not be narrowly construed.[44] Yet, it is desirable to define the term as most countries operating under the restrictive theory define it. Perhaps those "sensitive nerves" will not be avoided, but the decisions of the U.S. courts to exercise jurisdiction will be backed by a consensus of world opinion.[45]

Although not specifically stated by the court, the *Texas Trading* test for commercial activity synthesized from all these sources seems to be: Presuming that contracts for the sale of goods are commercial activities, is the activity one in which a private person could engage?

B. *Statutory Subject Matter Jurisdiction: The Direct Effects Clause*

The *Texas Trading* court found subject matter jurisdiction under the

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39. All the cases listed in note 33 *supra* involved the shipment of grain.

40. *See* Claim Against the Empire of Iran, 45 I.L.R. 57 (W. Ger. BVerfG 1963).

41. For instance, section 3 of the State Immunity Act of the United Kingdom defines "commercial transaction" as:

> (3)(a) any contract for the supply of goods or services;
>
> (b) any loan or other transaction for the provision of finance and any guarantee or indemnity in respect of any such action or of any other financial obligation; and
>
> (c) any other transaction or activity (whether of a commercial, industrial, financial, professional or other similar character) into which a State enters or in which it engages otherwise than in the exercise of sovereign authority . . . .

48 HALSBURY'S STATUTES at 90.

42. *See* Claim Against the Empire of Iran, 45 I.L.R. at 80.

43. OPEC v. Organization of Petroleum Exporting Countries, 477 F. Supp. 553, 567 (C.D. Cal. 1979).

44. In re Rio Grande Transport, 516 F. Supp. 1155, 1162 (S.D.N.Y. 1981), decided subsequently to *Texas Trading*, takes the position that "regular course of commercial activity" should be construed broadly to give those aggrieved by the acts of a foreign sovereign access to American courts.

45. Thus, the finding in *Texas Trading* that Nigeria was engaged in commercial activity was based in part on the fact that other courts of the world had uniformly found Nigeria's cement purchases to be a commercial activity.

direct effects clause of section 1605(a)(2).[46] In so doing, the court construed the phrase "direct effect in the United States" as requiring two determinations: (1) whether there was a "direct effect" on the plaintiff and (2) whether the effect occurred "in the United States." The court found no guidance from Congress' suggestions that the clause be construed consistently with the principles of section 18 of the *Restatement of Foreign Relations Law*[47] and that the clause might be intended as a long-arm statute.[48] However, the court did rely on previous decisions, in particular *Harris v. VAO Intourist, Moscow*,[49] *Upton v. Empire of Iran*,[50] and *Carey v. National Oil Corp.*[51] *Harris*[52] and *Upton*[53] together seem to establish that a direct effect is one which is substantial, foreseeable and immediate with no intervening elements. *Carey* stands for the principle that the breach of a contract is such a direct effect. Thus, in a corporate setting, *Texas Trading* found that a direct effect is a financial loss. Consequently, Nigeria's breaches of the cement contracts or breaches of the letters of credit were deemed by the court to be direct effects since the breaches resulted in financial losses to the four plaintiffs.

The court found that failure to pay an American corporation triggers the statutory language "in the United States."[54] In interpreting this statutory language, the court examined the above-referenced cases and other state cases for guidelines. However, the search did not reveal a suitable

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46. The direct effects clause provides: "A foreign state shall not be immune . . . in any case . . . in which the action is based . . . upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States . . . ." 28 U.S.C. § 1605(a)(2) (1976).

47. HOUSE REPORT, *supra* note 3, at 19. The Restatement provides:

> A state has jurisdiction to prescribe a rule of law attaching legal consequences to conduct that occurs outside its territory and causes an effect within its territory, if either
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> . . . .
>
> (b)(i) the conduct and its effects are constituent elements of activity to which the rule applies; (ii) the effect within the territory is substantial; (iii) it occurs as a direct and foreseeable result of the conduct outside the territory . . . .

RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW § 18 (1965).

48. HOUSE REPORT, *supra* note 3, at 6611-12.

49. 481 F. Supp. 1056 (E.D.N.Y. 1979).

50. 459 F. Supp. 264 (D.D.C. 1978), *aff'd per curiam*, 592 F.2d 673 (2d Cir. 1979).

51. 453 F. Supp. 1097 (S.D.N.Y. 1978), *aff'd per curiam*, 592 F.2d 673 (2d Cir. 1979).

52. *Harris* relies on the Restatement to arrive at this test for "direct effect." 481 F. Supp. at 1062-63.

53. *Upton* relies on an analogy of the Immunities Act to the District of Columbia's long-arm statute to arrive at its definition of "direct effect." 459 F. Supp. at 266.

54. The court did not make a ruling whether failure to pay a foreign corporation in the United States or to pay an American corporation abroad would be "in the United States." In re Rio Grande Transport, 516 F. Supp. 1155, 1163 (S.D.N.Y. 1981), decided subsequently to *Texas Trading*, held that an American corporation injured overseas incurs a direct effect in the United States if it suffers financial loss as a result of that injury. Rio Grande Transport lost considerable revenue when its ship sank after colliding with an Algerian ship on the high seas.

standard. The court appeared to be concerned with the question of access to the courts for parties aggrieved by the commercial activities of a foreign state. It was the intent of Congress[55] that such access be provided to private litigants. As the "direct effect" and "in the United States" clauses are open to many interpretations, the ultimate question should be: "[W]as the effect sufficiently 'direct' and sufficiently 'in the United States' that Congress would have wanted an American court to hear the case?"[56]

This line of reasoning leads to the conclusion that any borderline cases would be decided in favor of allowing litigation to proceed. Accordingly, the *Texas Trading* court asserted broader jurisdiction under the direct effects clause than any prior court.[57] Since effects jurisdiction is not widely accepted in the world, such a broad assertion of effects jurisdiction over foreign states might be harmful to our foreign policy.[58]

C. *Article III Subject Matter Jurisdiction*

Since each of the four cases is between a New York corporation and a foreign state, diversity of citizenship exists and article III of the Constitution is satisfied.[59] Therefore, the federal courts properly have subject matter jurisdiction in these four cases.[60]

D. *Statutory Personal Jurisdiction*

Statutory personal jurisdiction under section 1330(b) exists if section 1330(a) is satisfied and if service of process has been made pursuant to section 1608. Both conditions have been met in these four cases, so statutory personal jurisdiction over Nigeria and Central Bank was found to be proper by the court.

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55. HOUSE REPORT, *supra* note 3, at 6605-06.

56. *Texas Trading*, 647 F.2d at 313.

57. Prior to *Texas Trading*, the *Decor* district court had found jurisdiction to exist under the direct effects clause. The court in Maritime Int'l v. Republic of Guinea, 505 F. Supp. 141 (D.D.C. 1981), decided just shortly before *Texas Trading*, found jurisdiction as well, but Guinea had agreed to arbitration. This agreement to arbitration was found to be a waiver of jurisdiction by the *Maritime* court.

58. However, the minimum contacts requirements must also be satisfied before personal jurisdiction can actually be asserted. This may limit the instances when jurisdiction will be found to exist.

59. U.S. CONST. art. III, § 2, cl. 1 provides: "The judicial power shall extend to all cases in Law and Equity, arising under this Constitution, the Laws of the United States; . . . to controversies . . . between a State, or the citizens thereof, and foreign States . . . ."

60. In Verlinden B.V. v. Central Bank of Nigeria, 647 F.2d 320 (2d Cir. 1981), a case decided the same day as *Texas Trading*, a suit between an alien corporation and a foreign state was dismissed for lack of diversity. The Immunities Act was not considered by the court a "law" for the purposes of article III since it is simply a procedural, not a substantive statute. Although constitutional subject matter jurisdiction was not found, statutory subject matter jurisdiction was found to exist.

E. *Due Process Analysis*

The *Texas Trading* court began by examining whether foreign states are "persons" within the meaning of the due process clause. The court found that prior case law indicates that foreign states are persons.[61] Consequently, the minimum contacts standards of *International Shoe*[62] and its progeny must be met before jurisdiction can be exercised over a foreign state.

The court then turned to the questions of "whose contacts?" and "with what?" The answer to the latter is the foreign state's contacts with the United States. This conclusion is reached because of the similarity of the service of process provision of the Immunities Act[63] and those of the antitrust and securities laws[64] which have been interpreted to allow jurisdiction to be exercised on the basis of contacts with the United States.[65] Most other courts interpreting the Immunities Act and which have considered the "with what?" question have concluded that contacts anywhere in the United States are jurisdictionally relevant, and have not limited the contacts to just those within the forum state.[66]

The answer to the "whose contacts?" question is the contacts of the defendant foreign state and those of its agents. The court's test for agency in this context is whether the agent "provides services beyond 'mere solicitation' and these services are sufficiently important to the foreign [state] that if it did not have a representative to perform them the [state's] own officials would undertake to perform substantially similar services."[67] Using this test, the *Texas Trading* court found Central Bank's activities attributable to Nigeria and Morgan's activities attributable to both since the entire payment mechanism would have collapsed without Morgan's performance. The attribution of an agent's contacts to the principal has been held appropriate by other courts looking at what contacts satisfy the minimum contacts standard under the Immunities Act.[68]

In order to assess how numerous the foreign state's contacts must be to satisfy the minimum contacts requirement, the court adopted the *In-*

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61. *See* Thos. P. Gonzales Corp. v. Consejo Nacional de Produccion de Costa Rica, 614 F.2d 1247 (9th Cir. 1980); Amoco Overseas Oil Co. v. Compagnie Nationale Algerienne de Navigation, 605 F.2d 648 (2d Cir. 1979); Purdy Co. v. Argen., 333 F.2d 95 (7th Cir. 1964); T.J. Stevenson & Co. v. 81,193 Bags of Wheat Flour, 399 F. Supp. 936 (S.D. Ala. 1975); and Rovin Sales Co. v. Socialist Republic of Rom., 403 F. Supp. 1298 (N.D. Ill. 1975).

62. International Shoe v. Washington, 326 U.S. 310 (1945).

63. 28 U.S.C. § 1608 (1976).

64. *See* 15 U.S.C. §§ 21(f), 77(v) (1976).

65. *See* Bersch v. Drexel Firestone, Inc., 519 F.2d 974 (2d Cir. 1975), *cert. denied*, 423 U.S. 1018 (1975); Mariash v. Morrill, 496 F.2d 1138 (2d Cir. 1974); Leasco Data Processing Equipment Corp. v. Maxwell, 468 F.2d 1138 (2d Cir. 1972).

66. *See Chicago Bridge & Iron*, 506 F. Supp. at 988; *East Europe*, 467 F. Supp. at 390.

67. Gelfand v. Tanner Motor Tours, Ltd., 385 F.2d 116, 121 (2d Cir. 1967), *cert. denied*, 390 U.S. 996 (1968).

68. *See* Outboard Marine Corp. v. Pezetel, 461 F. Supp. 384 (C.D. Del. 1978).

ternational Shoe standard: "[M]aintenance of the suit does not offend 'traditional notions of fair play and substantial justice.' "[69] In addition, the line of cases after *International Shoe* interpreting the minimum contacts required to satisfy the due process clause were relied on.[70] Using these precedents, the court established four tests to judge whether a foreign state's contacts with the United States are adequate to satisfy due process requirements: (1) to what extent did the defendants avail themselves of the privileges of American law; (2) to what extent was litigation in the United States foreseeable to the defendants; (3) the inconvenience to the defendants of litigating in the United States; and (4) the countervailing interest of the United States in hearing the suit.[71]

Applying these tests, the court found that Nigeria repeatedly and purposefully availed itself of the privileges of American law because of its extensive financial dealings with Morgan. New York law protected Nigeria in each of its transactions. Furthermore, because of its extensive business dealings with Morgan, Nigeria could have foreseen litigating in New York. The frequent visits to New York by Central Bank officials and Nigeria's worldwide business dealings negate any assertion by Nigeria that litigating in New York would be inconvenient. Finally, the Immunities Act was passed to provide access to the courts, and the United States has expressed a strong interest in providing a forum for such cases. Therefore, Nigeria's relation to the forum satisfied the due process clause requirements.

Court interpretations of what are the proper minimum contacts standards under the Immunities Act have been varied. Some interpretations have relied on an *International Shoe* analysis, although only one other court besides the *Texas Trading* court has established a specific set of guidelines.[72] Other courts have looked to long-arm statutes for guidance since section 1330(b) is patterned after the District of Columbia's long-arm statute.[73] In addition, other courts analyze differently the contacts required to satisfy clauses one, two and three of section 1605(a)(2).[74]

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69. 326 U.S. at 316.

70. World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980); Kulko v. Superior Court of Cal., 436 U.S. 84 (1978); Hanson v. Denkla, 357 U.S. 235 (1958); and McGee v. International Life Insurance Co., 355 U.S. 220 (1957).

71. *Texas Trading*, 647 F.2d at 314.

72. *Texas Trading* affirms the *Decor* decision which did set up a three-factor test. *Decor*, 497 F. Supp. at 1007.

73. Courts taking this approach rely on the District of Columbia's long-arm statute or their local long-arm statutes to set minimum contacts standards. The reliance on local long-arm statutes seems especially misplaced since Congress intended a uniform national standard. Although reliance on the District of Columbia's long-arm statute is probably appropriate because of the legislative history, most courts using this standard have failed to include an additional constitutional contacts analysis. Application of constitutional standards is called for by the legislative history and, of course, constitutional standards should always be applied.

74. *See* East Europe Domestic Int'l Sales v. Terra, 467 F. Supp. 383 (S.D.N.Y. 1979) and Chicago Bridge & Iron Co. v. Islamic Republic of Iran, 506 F. Supp. 981 (N.D. Ill. 1980).

Much of the confusion and diversity has resulted because these other courts do not separate their analyses of subject matter and personal jurisdiction questions. Since *Texas Trading* does analyze these questions separately, uniform minimum contacts standards can be applied in all cases.

IV. CONCLUSION

After an exhaustive analysis of jurisdiction under the commercial activity exception to the Immunities Act, the *Texas Trading* court developed a unique five-part test. This test separates the subject matter, personal jurisdiction, statutory, and constitutional questions, while providing standards for each part of the test. The *Texas Trading* test should provide needed uniformity in a substantial number of decisions involving the exercise of jurisdiction over foreign states. Thus, *Texas Trading's* elaboration of specific guidelines will give needed definition to the minimum contacts standard in the context of the Immunities Act.

The court noted throughout the opinion that access to the courts is the determinative factor in a decision to exercise jurisdiction. This liberal attitude has been embraced by a New York federal district court in *In re Rio Grande Transport.*[75] The *Rio Grande Transport* court repeatedly emphasized the concern of Congress that those aggrieved by the commercial acts of a foreign sovereign should be given a forum. Thus, the *Texas Trading* five-part test seems destined to lead to a uniform but broad exercise of jurisdiction over foreign sovereigns by the New York federal courts.

Wannell Baird

EMS Currency Rates Realigned

The European Monetary System (EMS) is the European Community's mechanism for linking the currencies of West Germany, France, Italy, Ireland, Denmark, Belgium, Luxembourg, and the Netherlands in a joint float against the U.S. dollar and other major currencies.[1] By promoting stable exchange rates, the EMS seeks to integrate and harmonize the

75. In re Rio Grande Transport, 516 F. Supp. 1155 (S.D.N.Y. 1981).

1. For an in-depth discussion of the European Monetary System, see Development, *The European Monetary System and the European Currency Unit*, 10 DEN. J. INT'L L. & POL'Y 175 (1980). *See also* Rey, *The European Monetary System*, 17 COMM. MKT. L. REV. 7 (1980).